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The Sanction Provision of the New California Civil Discovery Act, Section 2023: Will it Make a Difference or is it Just Another “Paper Tiger”?*

A system of discovery would be next to worthless unless it included sanctions for improper refusals to make the pretrial disclosures to which a litigant is entitled.

—James E. Hogan†

I. INTRODUCTION

The new California Civil Discovery Act of 1986 became effective on July 1, 1987. The Act was the culmination of a three year effort by a joint commission appointed by both the state bar and judicial council. The result was to completely revise the original 1957 system of civil discovery. The revision had three goals: "(1) to identify discovery abuses, and eliminate or at least reduce these abuses; (2) to codify the large accumulation of common law that had [accrued] over the three decades since [the] enactment of the [prior] 1957 law; and (3) to improve the organization and wording of the law."2 One of the main sections revised by the New California Civil Discovery Act is the

† 2 J. HOGAN, MODERN CALIFORNIA DISCOVERY 3d § 14.01 (1981). James E. Hogan, Professor of Law at U.C. Davis, was the reporter to the joint commission charged with the task of drafting the New California Discovery Act.
1. DEERING'S CALIFORNIA CODE OF CIVIL PROCEDURE: SPECIAL DISCOVERY ACT PAMPHLET 5 (Bancroft-Whitney 1987).
sanction provision embodied in section 2023. Formerly, sanctions were governed by section 2034. When it first appeared, the section was praised for following the federal trend. Since that time, the federal government has revised its sanctions provisions to solve many of the procedural problems which plagued the former statute. However, California was slow to institute similar revisions, and problems continued to plague the statute in the form of misuses of pretrial discovery. A common example involves the case of a large defense firm exploiting a sole practitioner by bombarding him with paperwork in the form of elongated interrogatories and frivolous motions. Such situations fostered the impression that misuse of pretrial discovery is rampant, and is a widespread problem among the legal profession in California.

The new sanction provision embodied in section 2023 is designed to minimize misuses in pretrial discovery. The section adopts a more organized and structural approach as compared to the former law. Although the Reporter's Notes to the Proposed Act of 1986 suggest the revisions are primarily definitional, with only a subtle change in the monetary sanctions, it is evident that many more substantial

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3. See CAL. CIV. PROC. CODE § 2023 (West Supp. 1988). For WESTLAW ® research select the CACS or CAST database and use this search query: Sanctions & “New Civil Discovery Act” & Monetary or Issue or Evidence of Terminating or Contempt. WESTLAW is a registered trademark of West Publishing Company.


6. Since 1957, the Federal Rules of Civil Procedure have been substantially revised on two occasions; once in 1970 and again in 1980. See Rosenberg, New Philosophy of Sanctions, in NEW FEDERAL CIVIL DISCOVERY RULES SOURCEBOOK (W. Treadwell ed. 1972). Referring to the 1970 revision, the author provides:

Revised Rule 37 tries to create a streamlined, updated, modernized apparatus for sanctions against obstructions or aggressions in the discovery process. Rule 37 provides sharper teeth, has more flexible jaws, and has quicker responsiveness to abuses in the discovery process than was available before. It keys the sanction provisions to the changed provisions on scope, mechanics, and tempo of discovery.

Id. at 140.


8. CALIFORNIA CONTINUING EDUCATION OF THE BAR, PREPARING NOW FOR DISCOVERY UNDER THE NEW ACT 5 (Oct./Nov. 1986) [hereinafter CEB].

9. Id. at 134 n.8. The reporter's notes are written by James E. Hogan. The relevant portions state:

CCP § 2023 SANCTIONS FOR ABUSES OF DISCOVERY Subdivision (a)—Abuses of Discovery Process. Because of the widespread concern with abuse
changes are involved. Indeed, the very act of codifying thirty years of developed common law through appellate court decisions into a new statute cannot conceivably be done without producing significant changes in the act itself. In view of the federal courts' success in limiting discovery abuses, a large measure of the new reforms follow the federal trend. Section 2023 even surpasses the federal rules and breaks new ground, for example, with its adaptation of the labor law concept of "meet and confer" requirements to counsel.

This article will carefully examine the new sanctions provision, section 2023, and compare it to the old provision, former section 2034. Part II discusses the statutory list of discovery misuses, and Part III deals specifically with meet and confer misuse. The various types of sanctions are dealt with in Part IV. Part V considers the impact of the frivolous motion in section 128.5 and Part VI analyzes miscellaneous concerns relating to sanctions being imposed. Finally, Part VII sets forth the requirements for a request for sanctions motion.

The focus of this article is to highlight significant changes in the law and give illustrations which will help practitioners understand how the new sanction provisions affect them. Finally, this article

of the discovery process at the present time, the Commission deems it desirable to list in a general way the major categories of actions that it regards as an abuse. [Compare proposed Section 2019(a), listing the methods of discovery.] Although the Commission has tried to make this list a comprehensive one, it recognizes that other categories of abuse may develop. Accordingly, this list of abuses is illustrative, not exhaustive. It is arguable that, in view of the detailed regulations of the discovery process in the various sections governing the individual methods of discovery, this subdivision is unnecessary. However, the Commission feels that the subdivision underscores the importance of conducting discovery in a manner that does not abuse the methods provided to achieve its goals.

Subdivision (b)—Sanctions for Discovery Abuse. This subdivision, derived from the present CCP § 2034, is mainly definitional in function. Throughout the proposed Discovery Act, the sanctions that may be imposed for any particular discovery dereliction are described simply as a "monetary sanction," an "issue sanction," an "evidence sanction," a "terminating sanction," or a "contempt sanction," followed by a cross-reference to this section to ascertain just what those terms mean. This subdivision enables the Commission to implement in a manageable way its decision that the sanctions available for a particular breach of a discovery duty should be specified in any particular section of the Discovery Act that creates that duty. The Commission believes that this approach to the matter of sanctions is preferable to that used in the present Discovery Act, which requires constant reference to CCP. § 2034, a cumbersome statute containing almost 1,400 words.

Id. at 134-35.
10. See sources cited supra note 5.
11. CAL. CIV. PROC. CODE § 2023(a)(9) (West Supp. 1988); see infra note 17 and accompanying text.
will point out problems of ambiguity and open questions associated with the new statute.

II. MISUSES OF PRETRIAL DISCOVERY

The new law adopts a fresh approach by listing nine acts which constitute discovery misuses. The list is illustrative rather than exhaustive. The Joint Commission, which wrote the new act, felt that this approach was desirable “because of the widespread concern with abuse of the discovery process . . . .” The list includes:

1. Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery.
2. Using a discovery method in a manner that does not comply with its specified procedures.
3. Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.
4. Failing to respond or to submit to an authorized method of discovery.
5. Making, without substantial justification, an unmeritorious objection to discovery.
7. Disobeying a court order to provide discovery.
8. Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery.
9. Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that such an attempt has been made. Notwithstanding the outcome of the particular discovery motion, the court shall impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorneys fees, incurred by anyone as a result of that conduct.

The significance of listing misuses is twofold. First, it gives timid judges a solid foundation from which to work. It relieves them, in part, from making discretionary judgment calls, by providing a statutory framework to support the imposition of sanctions. Thus, they can take comfort in the knowledge that the sanctioned behavior is defined as a misuse by the act. Second, the listing adds clarity and predictability to pretrial procedures, enabling both judges and attorneys to better understand whether or not specific acts constitute misuses. Certain acts are defined as misuses in the statute, and are consequently subject to little, if any, subjective interpretation. Sec-

13. CEB, supra note 8, at 134. This approach was followed in § 2019(a)(1)-(6) which lists several means by which discovery can be obtained. CAL. CIV. PROC. CODE § 2019(a)(1)-(6) (West Supp. 1988).
14. CEB, supra note 8, at 134.
tion 2023(a) clarifies what does and does not constitute a misuse, thereby further deterring such misuses.

III. MEET AND CONFER

The "meet and confer" requirement in subsection (a)(9) is not entirely new to California discovery procedures. The concept originated in labor law pertaining to resolving differences between employers and employees in the public sector. With regard to discovery procedures, the meet and confer requirement has been utilized for a few years on a local level. On a statewide level, the meet and confer rule originally pertained only to motions to compel answers or further answers to interrogatories, requests for admissions, or motions to protect the responding party. Later, this requirement was extended to all motions to compel or limit discovery. With the enact-

16. Id. § 2023(a)(9).
17. California labor law embraces the "meet and confer" concept in Cal. Gov't Code §§ 3500-3511 (West 1980). The act defines meet and confer as follows: "meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

18. Two local jurisdictions which have imposed meet and confer requirements are San Francisco and Los Angeles. See The Rutter Group, supra note 5, §§ 8:1018-8:1031 for a discussion of the impact of the meet and confer requirement on local jurisdictions already recognizing it. A foremost question is whether the new Discovery Act overrides the local requirements for a filing of joint statements. Id. §§ 8:1024-8:1030.
19. Cal. R. Ct. 222.1 which was adopted January 1, 1980. The rule provides: A motion to compel answers or further answers to interrogatories or requests for admissions or to protect the responding party shall include a declaration stating facts to show that prior to the filing thereof counsel for the moving party made a reasonable attempt to resolve the objections and disputed issues with opposing counsel but the attempt was unsuccessful. If the court finds that there was no good reason for the refusal or failure to resolve the matter, it may order any persons at fault to pay to the moving party the amount of reasonable expenses incurred in making the motion including reasonable attorney's fees.
20. Cal. R. Ct. 339, which superseded CRC 222.1, Jan. 1, 1984. The rule states: A motion to compel or limit discovery shall include a declaration or affidavit stating facts to show that prior to filing the motion counsel for the moving
ment of the new California Discovery Act, the meet and confer requirement now applies to almost all the specified provisions. The statute provides that if the section governing a particular discovery motion requires the parties to meet and confer, one party must confer either in person, or by telephone, or by letter with the opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery prior to filing a motion. Thereafter, if one side files a motion seeking sanctions, that party must include a declaration stating facts showing that such an attempt has been made.

For example, in a wrongful termination case alleging several causes of action and seeking punitive damages, the plaintiff’s attorney files interrogatories inquiring into the company-employer’s net worth. The defendant refuses to answer. The plaintiff’s attorney wishes to seek sanctions coupled with an order to compel answers, but he must first meet and confer with the opposing counsel. After a deposition of one of the defendants in the action, the two sides begin to discuss the interrogatories and are able to resolve the problem.

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党 was the reasonable attempt to resolve the objections and disputed issues with opposing counsel in person, by telephone, or by letter, but the attempt was unsuccessful. Failure to comply with this rule or to attempt to resolve the matter in good faith may be deemed an action not based on good faith which is frivolous or which causes unnecessary delay under section 128.5 of the Code of Civil Procedure.

Id. The new Discovery Act has superseded the California Rules of Court. Deering’s California Code of Civil Procedure: Special Discovery Act Pamphlet, supra note 1, at 5.

21. See 2 J. DeMio, California Deposition and Discovery Practice § 42.03(2) (1987). The author lists eight instances in which the meet and confer provision does not apply:

2. A motion for an order compelling responses to interrogatories. [§ 2030(k)];
3. A motion for an order compelling a response to a demand for inspection of documents and things. [§ 2031(k)];
4. A motion for an order compelling a responding party to permit inspection of documents or things in accordance with that party’s statement of compliance. [§ 2031(m)];
5. A motion by a defendant to compel response and compliance with a demand for a physical examination in a case in which plaintiff is seeking recovery for personal injuries. [§ 2032(c)(6)];
6. A motion for an order imposing sanctions for failure to submit to or produce another for a physical examination. [§ 2032(f)];
7. A motion for a protective order during a physical examination. [§ 2032(g)(1)];
8. A motion for an order that the genuineness of documents or truth of matters specified in a request for admission be deemed admitted. [§ 2033(k)].

23. Id.
within ten minutes. The resolution saves both parties the cost of filing a motion or answering and having to appear in court to argue the motion. In addition, the meet and confer rule encourages cooperation between the two parties to the suit.

Practitioners should note that sanctions may be imposed for a violation of the meet and confer requirement regardless of whether the party actually misused pretrial discovery. The statute reads that “[n]otwithstanding the outcome of the particular discovery motion, the court shall impose a monetary sanction ordering that any party or attorney who fails to confer . . . [must] pay the reasonable expenses, including attorneys fees, incurred by anyone as a result of that conduct.” It is worth noting that the meet and confer requirement pertains to attorneys as well as nonattorneys.

While not entirely new to the California discovery process, the meet and confer requirement of the California Discovery Act will have the immediate impact of minimizing misuses in pretrial discovery by alleviating many of the problems inherent in pretrial discovery. Large firms, for example, no longer have the advantage of being able to burden sole practitioners with excess paperwork. Incentives are built into the meet and confer requirement which will save attorneys time and money by not forcing them to resolve all disputes in court. It now behooves counsel to meet and informally resolve their disputes, rather than to judicially contest every disagreement. In turn, judicial resources will be better utilized, resolving major disputes as opposed to mediating minor differences between counsel.

Perhaps the most significant aspect of the meet and confer provision is that it does not impose a major burden on attorneys or the parties. A telephone call can serve to resolve matters, thus eliminating the expenditure of increased time and expense. Although the telephone was surely used in attempts to resolve differences under the former law, attorneys now have an added incentive to resolve differ-

24. The example cited is drawn from the author’s law clerking experience in San Jose, California in 1987. By utilizing “meet and confer,” the two sides resolved their disputes without having to exert time and money filing and arguing a motion in court. The “meet and confer” did not prove inconvenient for the parties since it was conducted during the course of negotiating other matters of discovery.

25. L.A. Daily J., July 2, 1987, at 1, col. 2. The comment is by Judith Bloom who is the immediate past chair of the Los Angeles County Bar Association’s Trial Lawyers Section.


27. Id.

28. The term used in the statute is “anyone.” Id.
ences informally, as they are subject to sanctions if they do not do so. The direct effect of the meet and confer provision will be to encourage efficient resolution of pretrial disputes; the indirect effect will be to minimize pretrial discovery misuse by compelling parties to attempt to resolve differences during the discovery phase. An aggrieved party need no longer tolerate abuse for an elongated period of time while waiting for the court to issue a protective order; under the meet and confer provision, the party can act immediately to resolve the grievance.

IV. TYPES OF SANCTIONS

The new law retains most of the sanctions embodied in the former law. The statute identifies five different sanctions in the order of least to most severe; specifically, monetary, issue, evidence, terminating, and contempt sanctions. Although not as clearly defined, each of these sanctions was contained in the former law. The one exception is the arrest sanction which was formerly recognized, but is not specified in the new act. The contempt sanction, however, is substituted in its place.

The new law is more organized and structured than the former statute. Instead of being a cumbersome section composed of almost 1,400 words, the new statute labels the particular sanctions available for specified actions throughout the act. These sanctions are followed by a cross-reference to section 2023 which defines exactly what those terms mean. The Joint Commission desired that each particular breach of a discovery duty would be specified in the section of the Discovery Act which creates that duty. The result is a more organized and predictable approach for practitioners. (See Appendix).

One who engages in a particular misuse of pretrial discovery can consult the statute to see which sanctions apply to a given type of

29. Id. § 2023(b)(1).
30. Id. § 2023(b)(2) (court orders designated facts to be taken as established).
31. Id. § 2023(b)(3) (court prohibits party engaging in discovery abuse from introducing designated matters in evidence).
32. Id. § 2023(b)(4) (court may impose order to strike, stay proceedings, dismiss the action, or render a judgment of default).
33. Id. § 2023(b)(5).
34. Former CAL. CIV. PROC. CODE § 2034(b)(2)(D), 2034(c) (West 1983) (monetary sanction); id. § 2034(b)(2)(A) (issue sanction); id. § 2034(b)(2)(B) (evidence sanction); id. § 2034(b)(2)(C) (terminating sanction); id. § 2034(b)(1) (contempt sanction).
35. Arrest sanction was embodied in former CAL. CIV. PROC. CODE § 2034(b)(2)(E) (West 1983). The section provided that the court "may make any orders in regard to the refusal [to obey a court discovery order] which are just, including . . . an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental or blood examination." Id.
36. See supra note 9 and accompanying text.
37. See supra note 9 and accompanying text.
conduct. For example, an advocate who fails to comply with a court order compelling responses to interrogatories can turn to section 2030(k)\(^{38}\) and determine that this conduct may subject him or her to monetary, issue, evidence, and/or terminating sanctions. (See Appendix). The cross-reference to section 2023 then enables the attorney to ascertain what those sanctions entail.

This format enables attorneys to predict the extent of possible liability which their actions will subject them to, since all potential sanctions which may be imposed are set out in the statute. Consequently, both judges and attorneys can fully realize the ramifications of specific misuses and take steps accordingly. The result is more predictability and less discretion in pretrial discovery.

**A. Monetary Sanctions**

The new subsection concerning monetary sanctions reflects three significant changes from the former law. First, the burden of proof for substantial justification now rests with the non-moving party. Second, sanctions are mandatorily imposed in many instances. Third, anyone, not just a party to the lawsuit, can seek recourse for harm suffered due to another's misuse of pretrial discovery.

The burden of proving substantial justification no longer rests with the moving party but now shifts to the non-moving party.\(^{39}\) The former law provided that if the court found counsel's refusal, failure, or objection to comply with the discovery process to be without substantial justification, it was free to impose monetary sanctions.\(^{40}\) The onus fell on the moving party to show that the non-moving party had not acted with substantial justification, thereby justifying an award of monetary sanctions.\(^{41}\)

The new law follows the language and the approach of the federal courts by stating that “after notice to any affected party, person, or

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\(^{38}\) CAL. CIV. PROC. CODE § 2030(k) (West Supp. 1988). The relevant portions of the rule provide:

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to interrogatories. . . . If a party then fails to obey an order compelling answers, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of, or in addition to that sanction, the court may impose a monetary sanction under Section 2023.

\(^{39}\) See generally 2 J. DEMEO, supra note 21, § 42.10[1][B].

\(^{40}\) Former CAL. CIV. PROC. CODE § 2034(a).

\(^{41}\) Id.
attorney, and after opportunity for hearing, the court shall impose the sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." In effect, this creates a presumption of abuse on the part of the non-moving attorney. The test of "substantial justification" is unchanged; however, the non-moving party is now forced to prove a defense. One judge comments that the desired result is "that sanctions will be awarded in far more cases than before. And that, in turn, is supposed to encourage parties and their counsel to cooperate with discovery and avoid unnecessary court proceedings." No longer can an advocate who is accused of a pretrial discovery abuse, which mandates the imposition of a monetary sanction remain silent, awaiting the moving party's substantiation of his claim. Rather, the attorney will be forced to assert justifiable reasons for his conduct. Advocates who are unsure if their actions are justified will not act, or will at least hesitate before acting, because they will be required to prove their reasons in a court of law. The inconvenience of having to go to court and explain questionable conduct, coupled with the anxiety about the possible outcome, will deter many practitioners.

Shifting the burden of showing substantial justification to the non-moving party eliminates the "willfulness" requirement of the old law. In a case where one side refuses to answer an interrogatory, the former law provided that the party seeking sanctions had to demonstrate that the opposing party's objections "were insubstantial, were interposed for purposes of delay or harassment, or were otherwise unreasonable." The new law shifts the focus away from showing willfulness on the part of the non-moving party, to the non-moving party having to prove some justifiable excuse for his actions.

The second major difference between the old and the new rule is the imposition of mandatory monetary sanctions. The language of

42. CAL. CIV. PROC. CODE § 2023(b) (West Supp. 1988).
43. Id. § 2023(b)(1).
45. Epstein, supra note 2, at 19, 21.
46. See 2 J. DEMEO supra note 21, § 42.10[6].
47. Union Mut. Life Ins. Co. v. Superior Ct., 80 Cal. App. 3d 1, 15, 145 Cal. Rptr. 316, 324 (1978) (action to recover under long-term disability insurance policy, wherein defendant failed to permit discovery in avenues open to class action and sought a restraining order against plaintiff's motion to compel discovery. The court held that plaintiff's award of $300 in monetary sanctions was improper.).
49. See 27 CAL. JUR. 3d Discovery and Depositions § 317 (1987); see also Sherwood, supra note 7, at 567. The author commented in 1981 that the state should mandatorily impose monetary sanctions. Id. at 610-11.
the new act replaces "may" with "shall" for the purpose of imposing sanctions,\(^{50}\) thereby compelling the court to apply sanctions if there is a misuse of a specified provision of the Act.\(^{51}\) Under the former statute the trial judge had absolute discretion to determine whether the actions of one advocate constituted a misuse, and whether these actions were deserving of the imposition of sanctions. The new statute usurps, for the most part, the judges' discretion as to what constitutes a misuse.

An optimistic member of the joint council responsible for making the reforms comments: "Judges will take it as a mandate to get very tough on discovery abuse, and will probably be very pleased to be able to do this."\(^{52}\) Courts only retain discretion to decide whether there is substantial justification or other reasons for the misuse. In addition, litigants will be better able to predict whether they will be sanctioned for certain discovery misuses.

The amount of the monetary sanction award should become standardized so that it will be based on misuses of pretrial discovery rather than judges' sentiments. This point may be somewhat undercut by the requirement that the courts determine whether the attorney's actions were substantially justified. Instead of refusing to award sanctions because a party's behavior does not constitute a misuse of pretrial discovery, judges may find the actions to be a misuse but deny the imposition of monetary sanctions on the grounds that the actions were substantially justified.\(^{53}\) Although the court still has discretion, the determination of misuse is generally no longer subject to judicial interpretation. Henceforth, sanctions are likely to be imposed more frequently for abusive actions in pretrial discovery.

In addition to mandating the imposition of monetary sanctions, the new law leaves full discretion with the courts to decide whether acts not specifically mentioned in the new statute do, in fact, constitute a misuse and require the imposition of monetary sanctions.\(^{54}\) Section 2023(b)(1) provides that the court may impose a monetary sanction where a person engages in the misuse of pretrial discovery or where a person unsuccessfully asserts that another has engaged in the mis-

\(^{50}\) CAL. CIV. PROC. CODE § 2023(b)(1) (West Supp. 1988); see infra note 55 and accompanying text.

\(^{51}\) Id.; see also 27 CAL. JUR. 3D Discovery and Depositions § 317 (1987).


\(^{53}\) See CAL. CIV. PROC. CODE § 2023(b)(1) (West Supp. 1988); see also infra note 55 and accompanying text discussing the needed flexibility maintained by this rule.

use of pretrial discovery. Consequently, this gives the court system needed flexibility to determine whether actions not specified by the new act constitute a misuse.

The final change that the discovery act makes is that a person seeking sanctions due to an advocate’s misuse of pretrial discovery processes does not have to be a “party” to the suit. The new act uses the term “anyone” which implies that third parties victimized by pretrial procedures can seek recourse against the abusing litigant. For example, a witness to an auto accident, who is due to be deposed, arrives at the place of deposition only to be informed that one of the attorneys cannot attend. A new time is scheduled and the witness again arrives only to learn that the deposition was cancelled and that one party failed to notify the deponent. Assuming that the court finds one attorney has misused the discovery process, the deponent will now be able to seek monetary sanctions.

Whether the courts will have jurisdiction over third parties is an open question. If the third party is a witness subpoenaed to testify or attend a deposition, jurisdiction will be based on the consent of the parties involved in the immediate action. As for instances regarding non-subpoenaed third parties, the question of establishing jurisdiction

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55. Id. § 2023(b). This gives the courts a needed flexibility as pointed out in the Reporter’s Notes to the Proposed Act of 1986 which quote the Advisory Committee to the Federal Rules. The relevant portions provide:

This wording is taken from FRCivP [sic] 37(a)(4), as amended in 1970. The Advisory Committee provided the following explanation for this change:

At present, an award of expenses is made only if the losing party or person is found to have acted without substantial justification. The change requires that expenses be awarded unless the conduct of the losing party or person is found to have been substantially justified. The test of ‘substantial justification’ remains, but the change in language is intended to encourage judges to be more alert to abuses occurring in the discovery process. On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists.

And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

The proposed change provides in effect that expenses should ordinarily be imposed unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust—as where the prevailing party acted unjustifiably. The amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices.

CEB, supra note 8, at 135-36.


57. Id.; see also 27 CAL. JUR. 3D Discovery and Depositions § 316 (1987). The author notes that the former law did apply to a non-party to the suit, namely a witness whose responses were sought to be compelled in a motion requesting sanctions. Id.

58. 27 CAL. JUR. 3D Discovery and Depositions § 316 (1987).
remains open. Clearly, without jurisdiction, the courts cannot award sanctions. Permitting "anyone" to recover monetary sanctions expands the scope of liability for misuses of the pretrial procedures.

The impact of these three changes will be to expand the scope of liability for misuses of pretrial discovery. Additionally, the changes impose mandatory sanctions for certain misuses in pretrial discovery, and shift the burden to the one accused of a particular misuse to show substantial justification or other reasons why sanctions should not be imposed. The changes will have more efficacy in deterring discovery abuses than the prior law because there are greater costs and risks associated with misuses of pretrial discovery.

B. Issue Sanctions

The new law does not make any significant departure from the old law with respect to issue sanctions. Former section 2034(b)(2)(A) provided that the court may take facts "to be established for the purposes of the action in accordance with the claim of the party obtaining the order." Former subsection 2034(b)(2)(B) adds that the court may refuse "to allow the disobedient party to support or oppose designated claims or defenses. . . ." The new subsection 2023(b)(2) merely combines these two features of issue sanctions under the same heading. The end result is that the substance of the law remains substantially the same.

The Act provides that after giving notice to any affected party, person, or attorney, and opportunity for hearing, the court may take two courses of action. First, it may order that "the designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process." Second, the court may impose an "order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses."

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59. Id.
60. In referring to circumstances before the new law's enactment, Martin Quinn, member of the Northern Section of the Discovery Committee comments: "We're looking to put some teeth into sanctions . . . in part by making them mandatory rather than discretionary." CAL. LAW. June 1984, at 49.
62. Id. § 2034(b)(2)(B).
64. Id. § 2023(b).
65. Id. § 2023(b)(2).
66. Id.
The new law regarding evidence sanctions uses broader language than the former statute. The former section 2034(b)(2)(B) dealt with three instances wherein the court could exclude evidence. First, it could refuse to allow the disobedient party to support or oppose designated claims or defenses. The new law embodies this in the “issue sanctions” section. The former statute also provided that the court could prevent disobedient parties from introducing evidence, documents or items of testimony, and from introducing evidence of the physical or mental or blood condition of the person sought to be examined.

The new law simply states that “the court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing matters into evidence,” which largely follows the federal rules. It dictates a broader scope of evidence that may be excluded at trial or in the pleadings. The former statute merely provided that evidence of testimony or descriptions of a person’s physical or mental condition could be subject to exclusion. Consequently, the new evidence sanction uses broader language but, in substance, closely follows the prior law.

D. Terminating Sanctions

The four components of the terminating sanction in the new law exactly mirror those in the old law. Consequently, case law decided pursuant to the former statute is helpful in understanding the impact of terminating sanctions under the current law. First, the law provides that pleadings or parts of pleadings of any party engaging in abuse of the discovery process may be stricken. This has been interpreted by the courts to mean also that the unsuccessful imposition of a lesser sanction is not a prerequisite to the use of default.

Second, the law provides that proceedings may be stayed subject to

68. Id. § 2034(b)(2)(B).
70. Former CAL. CIV. PROC. CODE § 2034(b)(2)(B).
72. See FED. R. CIV. P. 37.
73. Both the former section 2034(b)(2)(C) and the new section 2023(b)(4) describe the same four orders which fall under the terminating sanction.
75. Housing Auth. of Alameda v. Gomez, 26 Cal. App. 3d 366, 371, 102 Cal. Rptr. 657, 659 (1972) (action to recover possession of certain buildings and to obtain money damages wherein defendant failed at least twice to appear and be deposed. The court struck defendant’s answer and cross-complaint and entered a default judgment against defendant).
one party's obeying a discovery order.\textsuperscript{76}

Third, in the event of abuse of pretrial discovery, the law provides that either a part of or the whole action may be dismissed.\textsuperscript{77} Prior case law held that dismissal without consideration of the merits of the case is fundamentally unjust unless the conduct of the adversely affected party interfered with the court's mission in seeking truth and justice.\textsuperscript{78} Dismissal is seen as a sanction of last resort available to the judiciary, not merely as a penal measure against the disobedient party, but also as a deterrent.\textsuperscript{79} Moreover, the unsuccessful imposition of a lesser sanction is not a prerequisite to an order for dismissal.\textsuperscript{80} Persistent hindering by either a plaintiff or a cross-complainant party of a defendant's requests for discovery results in a presumption, as a matter of law, that his or her cause of action is without merit and dismissal is just.\textsuperscript{81}

\begin{itemize}
\item \textsuperscript{76} CAL. CIV. PROC. CODE § 2023(b)(4)(B) (West Supp. 1988).
\item \textsuperscript{77} Id. § 2023(b)(4)(C).
\item \textsuperscript{78} Morgan v. Ransom, 95 Cal. App. 3d 667, 670, 157 Cal. Rptr. 212, 215 (1979) (attorney malpractice action wherein plaintiff failed to answer an interrogatory sent by defendant. The court held that sanctions imposed for plaintiff's failure to answer the interrogatory were unjust.).
\item \textsuperscript{79} National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1975) (antitrust suit wherein petitioners failed to answer written interrogatories. The court held that striking pleadings and entering a dismissal was a valid action which can be used to deter such abuses.).
\item \textsuperscript{80} Kaplan v. Eldorado Ins. Co., 55 Cal. App. 3d 587, 591-92, 127 Cal. Rptr. 699, 702 (1976) (action to recover under uninsured motorist coverage policy, wherein plaintiff failed to make himself available for deposition and physical exam. The court held that commitment to an academic program was not a sufficient legal excuse and dismissal without any lesser sanctions being imposed was valid.).
\item \textsuperscript{81} See Lumpkin v. Friedman, 131 Cal. App. 3d 450, 453-54, 456, 182 Cal. Rptr. 378, 380-81 (1982) (malicious prosecution suit wherein plaintiff failed to provide essential evidence, subpoena necessary witnesses, and present evidence in a proper form, causing judgment to be entered against him. The court held that the dismissal was valid since plaintiff's failure to comply with discovery procedures elicits a presumption that his action lacks any merit); see also Bernstein v. Allstate Ins. Co., 119 Cal. App. 3d 449, 451, 173 Cal. Rptr. 841, 842 (1981) (action to recover against insurer for its failure to defend or pay amount of damages under policy wherein plaintiff failed to answer interrogatories and court dismissed the suit. The court of appeal held that persistent refusal to make discovery results in presumption that the cause of action asserted lacks merit.); Kahn v. Kahn, 68 Cal. App. 3d 372, 383, 137 Cal. Rptr. 332, 337-38 (1977) (property dispute between former partners in a furniture business wherein plaintiff failed to obey discovery orders and the suit was dismissed. The court held that the persistent failure to comply with discovery strengthens the presumption that one cause of action lacks merit.).

The law formerly held that the dismissal judgment of plaintiff's cause of action can be used in a malicious prosecution case later brought by the defendant. Lumpkin v. Friedman, 131 Cal. App. 3d 450, 455-56, 182 Cal. Rptr. 378, 381 (1982).
Fourth, the law provides that a default judgment may be entered, but it should not be used when a lesser sanction would have served the same purpose, since the result is to give a windfall to the moving party. This terminating sanction should be used sparingly and only when lesser sanctions have failed. Moreover, if a default judgment is awarded, it is limited to the amount stated in the complaint.83

E. Contempt Sanctions

The new law concerning contempt sanctions is broader than the former statute. The old law listed three instances in which contempt sanctions could be awarded, including refusal to obey a lawful subpoena to attend a deposition or be sworn as a witness, refusal to attend a session in court, and refusal to obey a court order. The current law provides that the court may treat the misuse of the discovery process as a contempt of court and impose a contempt sanction accordingly. This broad approach mirrors the federal system.

83. Fred Howland Co. v. Superior Court, 244 Cal. App. 2d 605, 606, 611-12, 53 Cal. Rptr. 341, 346 (1966) (personal injury suit wherein defendant failed to answer interrogatories because defendant had a conflict of interest with his attorney and could not retain counsel in time. The defendant's answer was stricken and default judgment entered in the lower court. Id. at 606, 53 Cal. Rptr. at 342-43. The court held that default judgment was unjust since a monetary award would have more appropriately compensated the plaintiff for the delay. Id. at 612, 53 Cal. Rptr. at 346.).
84. Thomas v. Luong, 187 Cal. App. 3d 76, 81-82, 231 Cal. Rptr. 631, 633-34 (1986) (personal injury action arising out of an auto accident wherein defendant failed to appear at a deposition and answer interrogatories. The lower court struck defendant's answer and entered default judgment for the plaintiff. Id. at 80, 231 Cal. Rptr. at 633. The court held that the default judgment exceeded what was reasonably required to protect the injured party and was an abuse of discretion. Id. at 82, 231 Cal. Rptr. at 634.). Scherrer v. Plaza Marina Commercial Corp., 16 Cal. App. 3d 520, 523, 94 Cal. Rptr. 85, 87 (1971) (action to recover a real estate commission associated with the sale of certain real estate coupled with a cross-claim of indemnity, wherein neither witness nor witness' attorney appeared at two depositions, a pretrial conference, and a motion to strike the answer to a cross-complaint resulting in the defendant's answer being struck and default entered. The court held that the default judgment was proper. Id. at 524, 94 Cal. Rptr. at 88.).
85. Greenup v. Rodman, 42 Cal. 3d 822, 826, 726 P.2d 1295, 1297, 231 Cal. Rptr. 220, 222 (1986) (action of minority shareholders against majority shareholders of a dissipated corporation to recover for fraudulent transfer of assets, wherein defendant failed to answer questions at a deposition due to his reasoning that since it was Lincoln's birthday, it was a legal holiday. Id. at 823, 726 P.2d at 1296, 231 Cal. Rptr. at 221. In addition, defendant, while laughing, produced papers requested by plaintiff in a box filled with straw and horse excrement. After looking through the box, defendant told plaintiff's counsel and the court reporter to wash their hands thoroughly since it was treated with a toxic chemical. The lower court granted plaintiff's motion to strike defendant's answer and to enter default. The court then held that a default judgment amount was limited to the quantity specified in the prayer.). Id.
86. Former CAL. CIV. PROC. CODE § 2034(b)(1).
87. Id. § 2034(b)(1)(i).
88. Id. § 2034(b)(1)(ii).
89. Id. § 2034(b)(1)(iii).
and means effectively that any misuse of the discovery process might result in contempt sanctions. In contrast, under the prior law, the misuse had to involve either a breach of a discovery order or failure to make a court or deposition appearance.92

Unlike the former law,93 the new law does not treat contempt sanctions differently from the other sanctions. In particular, the prior law held that contempt sanctions could not be coupled with other sanctions since this would amount to double punishment.94 The new law, on the other hand, groups the contempt sanction along with the other sanctions.95 Thus, the imposition of sanctions can be imposed along with other sanctions without constituting double punishment.96

Whether contempt sanctions will require the "willfulness" of the actor, the approach under the old law, remains an open question.97 Although the new statute does not expressly require willful intent on behalf of the non-moving party, case law has generally required such a showing even in the absence of language to this effect in the former statute.98 One argument is that by failing to specify willfulness in the statute, the Joint Commission intended to eliminate the requirement. On the other hand, the omission of the word "willful" in the statute might be seen as a confirmation of former case law. In light of the severity of the sanction and its effect upon the non-moving party, the better view is that some form of willfulness must be established prior to awarding contempt sanctions.

V. THE APPLICABILITY OF SECTION 128.5 TO PRETRIAL DISCOVERY

A question remains whether section 128.599 applies to pretrial discovery or is limited to trial and post-trial matters. This issue arises because the new California Discovery Act has been declared as the

91. See FED. R. CIV. P. 37 advisory committee's note of 1970 to subdivision (b).
92. Former CAL. CIV. PROC. CODE § 2034(b)(1)(i)-(iii).
93. The contempt sanction was considered in a whole different category than the other sanctions. See THE RUTTER GROUP, supra note 5, §§ 8:1066-8:1067.
94. See id. § 8:740.
95. It is considered one of five different types of sanctions. See id. § 8:1066.
96. Id.
97. See 2 J. DE MEO, supra note 21, §§ 42.10[5][b]-[6].
98. Id.
99. CAL. CIV. PROC. CODE § 128.5 (West Supp. 1988). The statute provides:
(a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration
law governing all pretrial discovery.\textsuperscript{100} The better approach is to consider section 128.5 outside the scope of the new Act, and thus still applicable to pretrial discovery.\textsuperscript{101} This view is supported by the statutory language of section 128.5. The statute provides that sanctions can be levied pursuant to section 128.5 in addition to any other liability imposed by law,\textsuperscript{102} thus indicating that monetary sanctions awarded under this section can be added to other sanctions, such as those under section 2023. Moreover, the former law allowed an overlap between former section 2034 and section 128.5.\textsuperscript{103}

The significance of having these two mechanisms for recovering monetary sanctions is that they have different requirements. In section 128.5, "frivolous" is defined as totally and completely without merit, or for the sole purpose of harassing an opposing party.\textsuperscript{104} Section 128.5 applies exclusively to parties in the litigation, whereas section 2023 applies to anyone.\textsuperscript{105} Moreover, section 128.5 does not contain the "meet and confer" prerequisite embodied in section

\begin{quote}
Id.
\end{quote}

\textsuperscript{100} See Deering's California Code of Civil Procedure: Special Discovery Act Pamphlet, supra note 1, at 5.
\textsuperscript{101} See 2 J. DeMeeo, supra note 21, § 42.11 (1987); see also Lesser v. Huntington Harbor Corp., 173 Cal. App. 3d 926, 219 Cal. Rptr. 562 (1986). The court mentions that "nothing in section 128.5's language limits the section's application only to tactics or motions....[A] reasonable interpretation is that the section also applies to entire actions not based on good faith which are frivolous or cause unnecessary delay in the resolution of a dispute." Id. at 930, 219 Cal. Rptr. at 566.
\textsuperscript{103} Guzman v. Hambien Gauge Co., 154 Cal. App. 3d 438, 446, 201 Cal. Rptr. 246, 251 (1984) (dictum stating that sanctions may be imposed, in appropriate circumstances, under § 128.5 and § 2034).
\textsuperscript{104} See supra note 99 and accompanying text; see also In re Marriage of Flaherty, 31 Cal. 3d 637, 649-50, 646 P.2d 179, 185, 183 Cal. Rptr. 508, 516 (1982) (dissolution of marriage action involving dispute about child custody wherein the father's attorney was fined $500.00 for appealing the trial court orders. The appellate court held that the appeal was not frivolous since it raised substantial questions of family law and was not subjectively brought in bad faith. Id. at 651, 646 P.2d at 179, 183 Cal. Rptr. at 508.).
\textsuperscript{105} See supra note 57.
Although the two sections may overlap, it is unlikely that such an instance will occur very often. The standards for determining what actions are “frivolous” demand a clear and definite showing of misuse.\textsuperscript{107} Also, sanctions awarded under section 128.5 tend to be used “most sparingly to deter only the most egregious conduct.”\textsuperscript{108} Therefore, practitioners should note that section 128.5 is still applicable to pretrial discovery. However, the extent to which it will apply, either alone or in conjunction with section 2023, is limited.

VI. MISCELLANEOUS CONSIDERATIONS REGARDING SANCTIONS

In determining whether a court will impose sanctions in any given situation, four factors should be considered. First, the imposition of sanctions is always subject to due process.\textsuperscript{109} Under prior law, it has been held that:

\[\text{[w]hile under the statute the court undoubtedly has the power to impose a sanction which will accomplish the purpose of discovery, when its order goes beyond that and denies a party any right to defend the action or to present evidence upon issues of fact which are entirely unaffected by the discovery procedure before it, it not only abuses its discretion but deprives the recalcitrant party of due process of law.}\textsuperscript{110}]

Before imposing sanctions, the statute provides that notice must be given to the affected party, person, or attorney, in addition to an opportunity for a hearing.\textsuperscript{111} If the non-moving party has not received due process, it is an abuse of the court’s discretion to award the sanction.\textsuperscript{112}

Second, it should be remembered that the option of imposing sanctions is left within the court’s discretion by virtue of the statutory use of the word “may.”\textsuperscript{113} Consequently, the prior court procedure re-

\begin{itemize}
  \item \textsuperscript{106} See supra note 99 and accompanying text.
  \item \textsuperscript{107} 2 J. DeMeco, supra note 21, § 42.11[1][b].
  \item \textsuperscript{108} Marriage of Flaherty, 31 Cal. 3d at 651, 646 P.2d at 188, 183 Cal. Rptr. at 517.
  \item \textsuperscript{109} See generally J. Hogan, Modern California Discovery 3D (1981).
  \item \textsuperscript{110} Caryl Richards, Inc. v. Superior Court, 188 Cal. App. 2d 300, 305, 10 Cal. Rptr. 377, 381 (1961) (products liability action to recover for damages suffered to plaintiff’s eyes when defendant manufacturer’s hair-spray had been sprayed into them. The defendant refused a court order to disclose the exact formula of the hair-spray and the court entered a default judgment. The appellate court held that the sanction of default was too severe in that it prevented defendant from defending the action properly).
  \item \textsuperscript{111} CAL. CIV. PROC. CODE § 2023(b) (West Supp. 1988).
  \item \textsuperscript{112} See generally J. Hogan, supra note 109.
  \item \textsuperscript{113} The word “may” is used in the first half of section 2023(b)1 which provides: The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney’s fees, incurred by anyone as
\end{itemize}
garding the imposition of more severe sanctions, such as issue, evidence or terminating sanctions, can be studied to determine the court procedure regarding them.\textsuperscript{114}

Third, courts will avoid, where possible, imposing issue, evidence, or terminating sanctions because they are outcome-determinative of the litigation.\textsuperscript{115} Under the former law, courts hesitated before imposing these types of sanctions, reasoning that the client should not have to pay for the sins of the attorney.\textsuperscript{116} In effect, the courts followed, and perhaps continue to follow, a conservative approach by rarely imposing more than a minor monetary sanction.

Finally, sanctions can only be imposed if they are reasonably calculated to effect compliance with proper discovery procedures, and are not imposed solely for punitive purposes.\textsuperscript{117}

These four considerations indicate that, although the new statute reflects an increased willingness on the part of the legislature to allow the courts to impose sanctions, the ordering of sanctions has its limits. California case law has identified the concerns of ensuring due process, of avoiding punitive sanctions, and of cautiously applying sanctions that are outcome-determinative of the litigation. These concerns suggest that courts are still bound by constraints outside of those specified in the new statute. Consequently, practitioners should note that sanctions can still be avoided on other grounds not specified in the new statute.

VII. REQUEST FOR SANCTIONS

Section 2023(c)\textsuperscript{118} effectively repeals the 1987 California Rule of

\begin{quote}
a result of that conduct. The court may also impose this sanction on one un-
successfully asserting that another has engaged in the misuse of the discovery
process, or on any attorney who advised that assertion, or on both.
\end{quote}


114. See generally \textbf{THE RUTTER GROUP}, supra note 5, § 8:1070.

115. CEB, supra note 8, § 1.4.


117. Motown Records Corp. v. Superior Court, 155 Cal. App. 3d 482, 490-91, 202 Cal. Rptr. 227, 233 (1984) (civil action wherein plaintiff failed to timely comply with a court order requesting a factual showing of the basis for the claims. Plaintiff asserted that certain key documents were protected by the attorney-client and the attorney-work product privileges. Consequently, plaintiff was fined $1,000.00 which was to pay for defendant’s attorney fees. The appellate court held that the sanctions imposed were excessive since they were not reasonably calculated to achieve effective compliance with discovery and, as such, were punitive in nature.).

118. \textbf{CAL. CIV. PROC. CODE} § 2023(c) (West Supp. 1988). The section states:

\begin{quote}
A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought.
\end{quote}

\textit{Id.}
Court 341. The statute provides that a request for sanctions must include three items: (1) a notice of motion, (2) memorandum of points and authorities, and (3) a declaration.

The notice of motion must identify every person, party, and attorney against whom the sanction is sought, and must specify the type of sanction sought. In addition, it must be supported by a memorandum of points and authorities and a declaration setting forth facts stating the amount of any monetary sanction sought.

VIII. CONCLUSION

Section 2023 of the new California Discovery Act effects significant changes in the former law. By listing various misuses, the new law will add predictability and clarity to the system, and provide judges with clear guidelines regarding the imposition of sanctions. The adaptation of the “meet and confer” requirement makes informal cooperation amongst parties, generally through their attorneys, a high priority. This will also serve to undermine much of the advantage that large firms have in being able to burden small firms and sole practitioners with excess paperwork. Monetary sanctions, which follow the federal approach, are easier to apply and provide a stronger deterrent in pretrial discovery than other sanctions.

However, changes in the statute are only half the picture. The other half is the judiciary which has the power to make the new sanction provision a viable deterrent, instead of merely a paper tiger. Unless judges show advocates that sanctions will be imposed more frequently and more severely, attorneys will continue to misuse the pretrial discovery process. Moreover, absent gross and willful conduct, attorneys will be comfortable in the knowledge that sanctions will follow the trend of the former law and not be forthcoming. Even though the legislature has constructed a credible deterrent, it

119. Cal. R. Ct. 341. The rule states: “A request for sanctions in discovery matters shall name all parties and attorneys against whom sanctions are being sought, set forth facts supporting the amount, and state statutory or case authority.” Id.
120. See supra note 119.
121. Cal. Civ. Proc. Code § 2023(c) (West Supp. 1988). The statute seems to indicate that more than one type of sanction may be imposed. Consequently, although the usage of the language here is singular, it is best to list all types of sanctions sought if more than one is sought. See also supra note 119.
will remain lifeless unless the judiciary employs it to its fullest potential.

The general policy of conservatism\textsuperscript{124} surrounding the imposition of sanctions must be overcome if sanctions are to play a vital and active role in deterring misuses of pretrial discovery. This is not to say that sanctions must always be imposed; rather, judges must be more willing to use them as an instrument to deter discovery abuse.\textsuperscript{125} The conservatism with which lesser sanctions are currently imposed is indicative of the judiciary's perception that even these sanctions are punishment.\textsuperscript{126} A change which will minimize the misuses of pretrial discovery procedures is due, and will only occur with the judiciary's resolve.

\textbf{TIMOTHY MICHAEL DONOVAN*}

\textsuperscript{124} See generally Comment, supra note 7.
\textsuperscript{125} See generally Sherwood, supra note 7.
\textsuperscript{126} Comment, supra note 7, at 389. [appendix attached.]

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# General Procedures

## SANCTIONS

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<tr>
<th>Against Any Party, Person, or Attorney Who</th>
<th>Monetary</th>
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<th>Evidence</th>
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<th>Contempt</th>
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<td>or protective order limiting frequency or extent of discovery CCP § 2019(b)</td>
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<td>to extend or reopen discovery CCP § 2024(e)</td>
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<td>Engages in misuse of discovery process, advises such conduct, or asserts or advises that another has engaged in such conduct CCP § 2023(b)(1)</td>
<td></td>
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2 J. DeMoe, California Deposition and Discovery Practice § 42.41 (1987).
Oral Deposition

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<tr>
<td>serve required deposition subpoena CCP § 2025(j)(2)</td>
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**Oral Deposition (Cont’d)**

**SANCTIONS**

| AGAINST RESPONDING PARTY, PERSON, OR ATTORNEY WHO Makes unsuccessful opposition to motion: | Monetary Issue Evidence Terminating Contempt |
|---|---|---|---|---|
| to increase travel limits CCP § 2025(e) | ✓ | | | |
| to compel attendance and testimony CCP § 2025(j)(3) | ✓ | | | |
| to compel answer or production CCP § 2025(o) | ✓ | | | |
| Makes unsuccessful motion: to quash deposition notice CCP § 2025(g) | | ✓ | | |
| for protective order CCP § 2025(i) | | ✓ | | |
| for protective order to terminate or limit deposition CCP § 2025(n) | | ✓ | | |
| to suppress deposition CCP § 2025(q) | | ✓ | | |
| Fails to obey deposition subpoena by attending or being sworn CCP §§ 2020(h), 2025(j)(2) | | forfeiture and damages | | ✓ |
| Fails to obey order compelling: attendance, testimony, and production CCP § 2025(j)(3) | ✓ | ✓ | ✓ | ✓ |
| answer or production CCP § 2025(o) | ✓ | ✓ | ✓ | ✓ |
### Written Deposition

#### SANCTIONS

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<th>Issue</th>
<th>Evidence</th>
<th>Terminating</th>
<th>Contempt</th>
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</thead>
</table>
| **AGAINST DEPOSING PARTY OR ATTORNEY WHO**
  Makes unsuccessful opposition to motion to sustain objection
  CCP § 2028(d)(1) |   |   |   |   |
| Makes unsuccessful motion to overrule objection
  CCP § 2028(d)(2) |   |   |   |   |
| **AGAINST RESPONDING PARTY OR ATTORNEY WHO**
  Makes unsuccessful motion to sustain objection
  CCP § 2028(d)(1) |   |   |   |   |
| Makes unsuccessful opposition to motion to overrule objection
  CCP § 2028(d)(2) |   |   |   |   |

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### Interrogatories

#### SANCTIONS

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### Demands For Inspection

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### Physical or Mental Examinations

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## Requests For Admission

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## Exchange of Expert Trial Witness Information

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